313 U.S. 9

FILED
MAR 10 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1940

No. 830

THOMAS F. STEIN, JR.

Petitioner

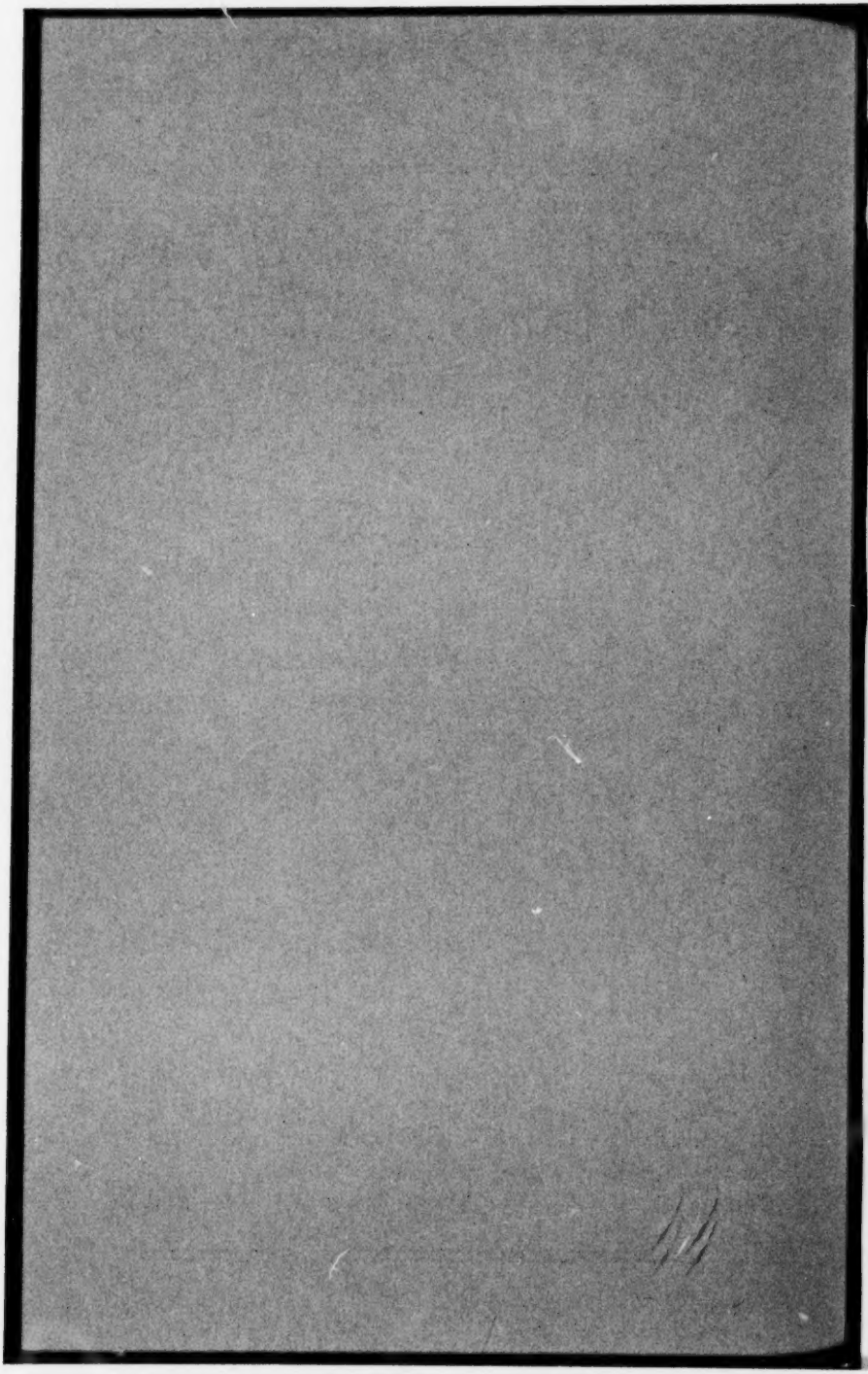
vs.

STATE OF ALABAMA

PETITION OF THOMAS F. STEIN, JR.

FOR

WRIT OF CERTIORARI



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The petition of Thomas F. Stein respectfully shows to this Honorable Court that the State of Alabama filed suit against him in the Circuit Court of Mobile County, Alabama (R. 1, 2, 3,) claiming a license tax due from him under a statute levying a fixed-sum license on everyone engaged in the business of merchandise broker or commission agent.

NATURE OF THE CASE

Stein, the petitioner, represented thirteen principals, all non-residents of the State of Alabama, and was engaged in the business of negotiating contracts between such non-resident principals and wholesale grocers resident in Alabama, and did not hold himself open as being willing to represent principals generally, but only non-resident principals and only such of those as he elected to represent. He would procure orders for merchandise from the local wholesalers and send in these orders to his non-resident principals who, if they accepted the orders, filled them by shipment direct to the purchaser. The order was filled by the non-resident principal and Stein was paid by way of commission based on his monthly sales. (R. 5, 6, 7, 8 and 9).

The State of Alabama levied a license tax as follows:

> "Every person, firm, company, corporation or association, receiver or trustee (not under governmental supervision) engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license and a County license when so required.....
>
> For every commission merchant or merchandise broker in cities of 50,000 inhabitants or over $50.00

In cities and towns of 25,000 and less than 50,000 inhabitants 35.00

In cities and towns of 10,000 and less than 25,000 inhabitants 25.00

In cities and towns of 5,000 and less than 10,000 inhabitants 15.00

In cities and towns under 5,000 inhabitants whether incorporated or not 10.00

There is also hereby levied for the use of each County in the State a license or privilege tax upon each person, firm, or corporation engaged in, or who shall carry on any of the occupations, businesses, professions or callings, or shall exercise any privilege or do any act for which a license is charged by the State, of fifty per cent (50%) of the State license or privilege tax, except as herein otherwise provided." (See General Acts 1935, Section 348, Page 441, Schedule 29, Page 450, Clause B, Section 350, Page 558).

An agreed statement of facts setting out in substance that which has been hereinabove set out was filed in the case, and the question was therefore presented:

1. As to whether Stein's course of conduct constituted interstate commerce; and

2. If Stein's course of conduct did constitute interstate commerce, was the license levied by the State a violation of the interstate commerce clause of the Federal Constitution (Article 1, Section 8, Clause 3).

In the trial court a judgment was rendered in favor of Stein (R. 4). The State thereupon prosecuted an appeal to the Court of Appeals of the State of Alabama, and the Court of Appeals concurred in the decision of the lower court and held that Stein's conduct amounted to interstate commerce and that the license levied on him was violative of the commerce clause of the Federal Constitution (R. 12 and 13).

The State of Alabama filed a petition in the Supreme Court of Alabama seeking the issuance of a writ of certiorari and the Supreme Court of Alabama reversed the holding of the Court of Appeals. The Supreme Court of Alabama therefore ruled that Stein was not engaged in interstate commerce and that even if he were engaged in such commerce, the license was non-discriminatory and therefore valid (R. 17, 18, 19, 20 and 21). The Supreme Court of Alabama is the Court of last resort of that State.

Your petitioner asserts that the judgment of the Supreme Court of the State of Alabama is erroneous and assigns the following specifications of error:

1. The Supreme Court of Alabama erred in holding that Stein was not engaged in interstate commerce.

2. One who represents non-resident principals exclusively and negotiates contracts between such non-residents and residents of the taxing state is

engaged in interstate commerce where the merchandise which is the subject of such solicitation is without the state at the time of the solicitation and is afterwards shipped into the state as a result of such solicitation.

3. The Supreme Court of Alabama erred in holding that even if Stein were engaged in interstate commerce, the license levied, being non-discriminatory, was valid.

4. Because the Supreme Court of Alabama erred in assuming that because the license was non-discriminatory it was therefore valid in that it would only be valid under such circumstances if the burden placed on interstate commerce was indirect.

5. The Supreme Court of Alabama erred in holding that the license levied on Stein was valid because it places a direct burden on interstate commerce.

6. The Supreme Court of Alabama erred in holding the license valid because a fixed-sum license levied on one who is engaged in negotiating contracts for the sale of merchandise between non-residents of a state and residents of such state infringes the commerce clause, by placing a direct burden on interstate commerce, where shipment of the merchandise is made by such non-residents direct to the purchaser and where the merchandise was not in the state of the purchaser at the time the order was procured.

Under these circumstances, and because the Supreme Court of Alabama passed on the validity of the statute of the State of Alabama set out herein, claimed to be repugnant to the Federal Constitution, it is asserted that this Court has jurisdiction to review the decision of the Supreme Court of Alabama by way of writ of certiorari. (Judicial Code 237, 28 U. S. C. A., Section 344 B).

The date of the judgment of the Supreme Court of Alabama sought to be reviewed was October 10, 1940, rehearing denied December 12, 1940.

The ruling of the Supreme Court of Alabama is in conflict with the following decisions of this court:

Robbins v. Taxing District of Shelby County, 120 U. S. 498.

Stockard v. Morgan, 185 U. S. 27.

Realsilk Hosiery Mills v. Portland, 268 U. S. 325.

Best & Company, Inc. v. Maxwell, 61 Supreme Court Reporter 334 (Advance Sheet).

Disanto v. Pennsylvania, 273 U. S., 34.

Texas Transport & Terminal Company v. City of New Orleans, 264 U. S. 150.

It is contended that the questions involved are identical in that the exact same situation with no differences was presented to this Court in the case of Stockard v. Morgan, supra, and this Court there held the license void. This ruling of the Court has not been overruled and, in fact, has been confirmed from time to time, even in the last few months.

The Federal question, viz. the unconstitutionality of the law because of the violation of the commerce clause of the Federal Constitution, was raised in the nisi prius court on the trial of this cause, the issue being raised by an agreed statement of facts filed in the case. The only question raised by said agreed statement of facts was whether the license was violative of the commerce clause; this likewise was the only question which was presented to the Court of Appeals of the State of Alabama, to which Court an appeal was taken from the nisi prius court and this question was raised by the Assignment of Error of the Appellant.

The Circuit Court and the Court of Appeals both held the license violative of the commerce clause and therefore void, and the State of Alabama filed in the Supreme Court of Alabama a petition for Certiorari, which petition was granted and the cause reviewed. The federal question, viz. the infringement of the commerce clause, was raised in the Supreme Court of Alabama in the petition for Certiorari by setting out therein the grounds on which the issuance of said Writ was sought.

There was no written opinion by the Circuit Court. The Court of Appeals disposed of the matter by saying in its opinion as follows:

> "To the contrary, this Court concludes from said agreed facts that Appellee is engaged exclusively in interstate commerce only, and the exaction of a license under the above section would be in direct violation of Article 1, Section 8 of the Constitution of the United States, which prohibits the various states from interfering with interstate commerce." (R. 12).

The Supreme Court of Alabama disposed of the federal question by saying in its opinion as follows:

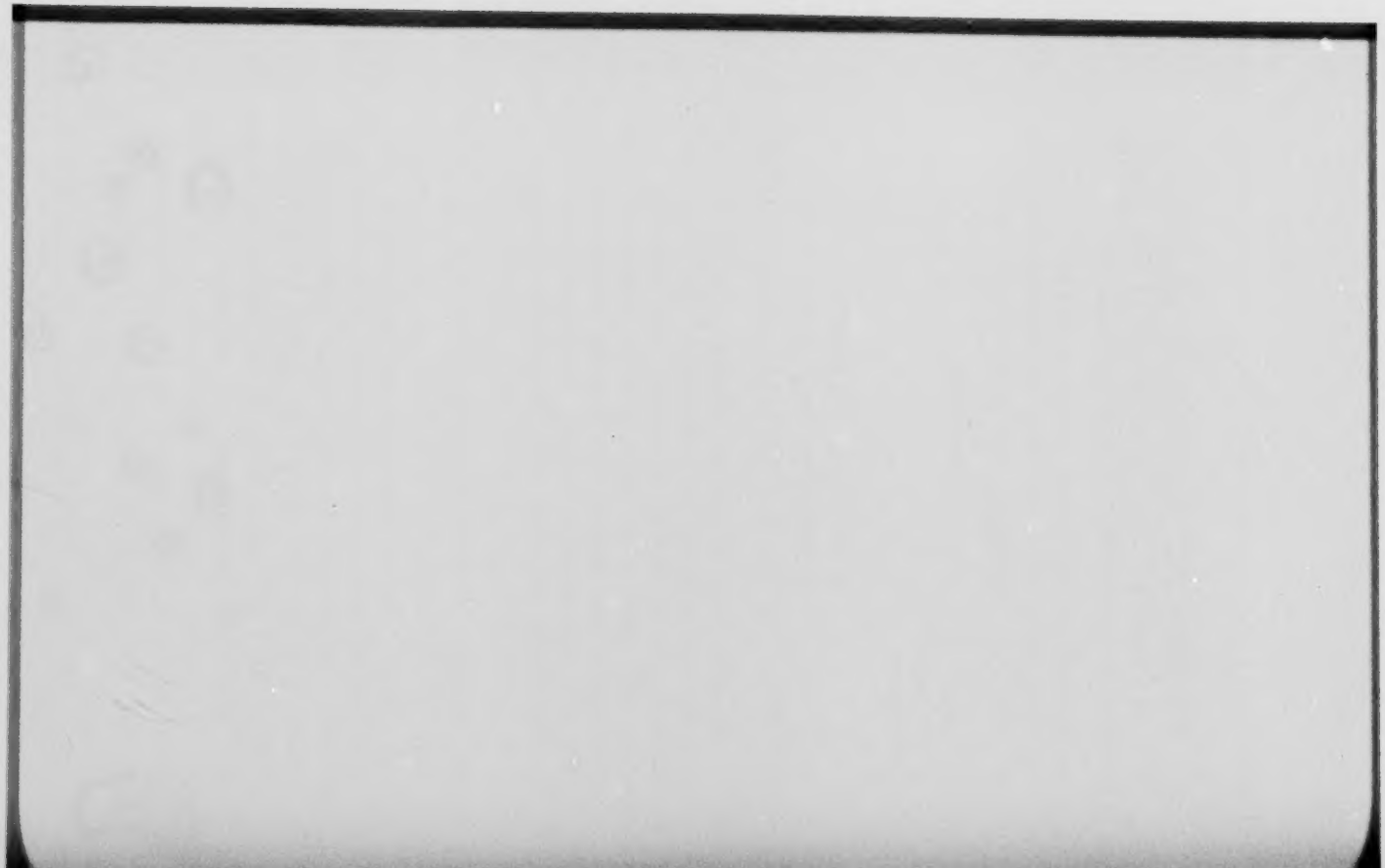
> "The position of the State's Counsel, in which we concur, is that Stein is not engaged in interstate commerce and if so, the non-discriminatory license tax upon him (the same license tax being imposed upon one doing intrastate business) is not inconsistent with the commerce clause of the Federal Constitution" (R. 19).

Assignment of Error number 3, made in the Court of Appeals and which raised the federal question of violating the commerce clause (R. 11), was answered by the above-quoted portion of the opinion of the Court of Appeals. The following grounds for granting the petition for a Writ of Certiorari raised in the Supreme Court of Alabama the federal question of violation of the commerce clause, viz. Grounds 4, 5, 6 and 8 (R. 15 and 16), and the above-quoted portion of the opinion of the Supreme Court of Alabama answered the grounds just above named.

WHEREFORE, your petitioner prays that a Writ of Certiorari may be issued out of this Court directed to the Supreme Court of Alabama.

THOMAS F. STEIN, JR.
Petitioner.

MARION R. VICKERS,
Counsel For Petitioner.



(19)

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vs.

[illegible]

Respondent.

PETITION FOR WRIT OF CERTIORARI

FILED ON BEHALF OF PETITIONER

[illegible]

[illegible]

[illegible]

Supreme Court of the United States

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THOMAS F. STEIN, JR.

Petitioner

vs.

STATE OF ALABAMA

BRIEF

FILED ON BEHALF OF PETITIONER

BY

MARION R. VICKERS
AS HIS ATTORNEY

On petition for Writ of Certiorari to the Supreme Court of the State of Alabama.

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I.

TABLE OF CASES

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294 U. S. 587

Realsilk Hosiery Mills v. Portland
268 U. S. 325

Rio Grande Western R. Company v. Stringham
239 U. S. 44

Robbins v. Taxing District of Shelby County
120 U. S. 498

Stockard v. Morgan
185 U. S. 27

Texas Transport & Terminal Company v. City of New Orleans
264 U. S. 150

United Gas Public Service Company v. State of Texas
303 U. S. 123, 625

Woodruff et al. v. Parham
8 Wall. 123

II.

OPINIONS BELOW

By Court of Appeals of Alabama.....199 Southern 11 (R. 12 and 13)

By Supreme Court of Alabama.....199 Southern 13 (R. 17, 18, 19, 20, 21)

These decisions are in advance sheet form and the citation of the Alabama report is not yet available.

III.

STATEMENT AS TO JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Judicial Code 237 as amended, 28 U. S. C. A., Section 344 B, on the ground that the decision of the Supreme Court of Alabama dated October 10, 1940, rehearing denied December 12, 1940, holds valid a statute enacted by the Legislature of Alabama, which statute was violative of the commerce clause of the Federal Constitution (Article 1, Section 8, Clause 3).

The statute in question levies a fixed-sum license on a merchandise broker or commission agent, and in the present instance was attempted to be applied to one who represented non-resident principals exclusively and who negotiated contracts between such non-resident principals and residents of Alabama.

The federal constitutional question was the only question in the case as will appear from the opinions below.

IV.

STATEMENT OF THE CASE

This case was filed by the State of Alabama against Stein and it likewise sued numerous other brokers; all of the brokers claimed the Statute, which levied the license, was unconstitutional. It was thereupon agreed that the Stein Case should serve as a test case.

An agreed statement of facts was entered into between the State of Alabama and Thomas F. Stein (R. 5, 6, 7, 8, 9) which in substance stated that the petitioner was engaged in business in the City of Mobile under the name of "Stein Brokerage Company;" that he was engaged in negotiating contracts for the purpose of staple groceries, canned goods and a general line of foodstuffs between purchasers in the City of Mobile, Alabama, and sellers or principals located without the State of Alabama. Stein held himself open as negotiating contracts only with bona fide wholesale grocers and the principals represented by him, in number thirteen. He did not hold himself open as willing to represent any principals unconditionally, but only such non-resident principals as were agreeable to him.

He would call on the wholesale grocers and secure orders from them for merchandise, these orders being directed to the principals represented by him, and the orders received would be forwarded direct to the non-resident principals who, if the orders were accepted, would fill them by shipment direct to the wholesale grocer in Mobile, Alabama. Stein was compensated by way of commissions based upon the orders procured by him and settlements were made on a monthly basis, no other remuneration being received for procuring such orders.

In some instances, where an order would be procured by Stein for less than a carload lot of a commodity on which the freight rate would be lessened by the shipment of a carload lot, Stein "would send in an order for a carload shipment of the particular commodity and the carload would be shipped to the particular jobber who has the largest portion of such car, or to the defendant. The defendant attempts to dispose of the unsold portion of the carload prior to the arrival of the shipment and, in the majority of cases, is able to do so. If an order is not procured for the unsold portion of the merchandise by the defendant prior to its arrival, it will be stored by him and subsequently sold." (R. 6).

On this agreed statement of facts the Circuit Court of Mobile County, Alabama, rendered a judgment in favor of Stein. (R. 4). From this judgment the State of Alabama appealed to the Court of Appeals of the State of Alabama, which held:

A. That the business engaged in by Stein constituted interstate commerce; and

B. The license was void because violative of the commerce clause of the Constitution of the United States, Article 1, Section 8 (R. 12).

The only question raised in either Court was the federal question set out above, and in the Court of Appeals this was raised by Assignment of Error number 3 (R. 11).

From the judgment of the Court of Appeals the State of Alabama applied to the Supreme Court of Alabama for a Writ of Certiorari (R. 14, 15, 16) and the federal question was raised in said petition by grounds numbers 4, 5, 6 and 8 (R. 15, 16). The Supreme Court of Alabama, in its opinion, held that:

A. Stein was not engaged in interstate commerce; and

B. Even if he were, the license was non-discriminatory and was therefore valid (R. 19)

Your petitioner applied to the Supreme Court of Alabama for a rehearing which was denied on December 12, 1940.

V.

SUMMARY OF ARGUMENT

POINT 1

The judgment of the Supreme Court of Alabama is a final judgment.

Authorities on Law:

Rio Grande Western Railroad Company v. Stringham, 239 U. S. 44.

POINT 2

One who is engaged in negotiating contracts for the sale of merchandise between non-residents of a state and residents of such state is engaged in interstate commerce where shipment of the merchandise is made by such non-resident principal direct to the purchaser and where the merchandise was not in the state of the purchaser at the time the order was procured.

Authorities on Law:

Crenshaw v. Arkansas, 227 U. S. 389

Disanto v. Pennsylvania, 273 U. S. 34

Norris v. State of Alabama, 294, U. S. 587

Robbins v. Taxing District of Shelby County, 120 U. S. 498

Stockard v. Morgan, 185 U. S. 27

United Gas Public Service Company v. State of Texas, 303 U. S. 123, 625.

POINT 3

The various cases in the Supreme Court of the United States dealing with the question as to whether a license tax infringes on the commerce clause of the United States Constitution lay down

two rules for determing the validity of such license tax, and such rules are:

A. If the license tax lays a direct burden on interstate commerce, it is void, and it is immaterial whether the tax is discriminatory or non-discriminatory.

The course of conduct engaged in by Stein brings him within this portion of the rule.

Authorities on Law:

Adams Manufacturing Company v. Storen, 304 U. S. 312

Best & Company v. Maxwell, 61 S. Ct. Reporter 334 (Advance Sheet)

Brennan v. City of Titusville, 153 U. S. 289

Constitution of the United States, Article 1, Section 8, Clause 3

Ficklen v. Taxing District of Shelby County, 145 U. S. 1

General Acts of Alabama 1935, Section 348, Schedule 29, Page 441, Section 350, Page 558, Page 450, Clause B

McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33

Realsilk Hosiery Mills v. Portland, 268 U. S. 325

Robbins v. Taxing District of Shelby County, 120 U. S. 498

Stockard v. Morgan, 185 U. S. 27

Texas Transport & Terminal Company v. City of New Orleans, 264 U. S. 150.

B. A license tax which places an indirect burden on interstate commerce is valid, if nondiscriminatory.

The various cases cited by the State of Alabama all come within this category.

Authorities on Law:

Curry v. Feld, 228 Alabama 255, 190 Southern 88

Graybar Electric Company v. Curry, 238 Alabama 116, 189 So. 186, Application for Certiorari denied and dismissed by the Supreme Court of the United States, 208 U. S. 513

Hinson v. Lott, 8 Wall. 148

McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33

Woodruff et al. v. Parham, 8 Wall. 123.

VII.

ARGUMENT

THE JUDGMENT OF THE SUPREME COURT OF ALABAMA IS FINAL

POINT 1

The first question which might cause concern is whether the judgment in this case is a final judgment. The State filed suit against Stein seeking to collect the license tax imposed on anyone engaged in the business of a merchandise broker or commission agent, and Stein, the Defendant, was successful in

the trial court and in the Court of Appeals, but the Supreme Court of Alabama reversed and remanded the case to the Circuit Court of Mobile County.

The case went to trial on an agreed statement of facts, and hence, while there is no judgment against the defendant, Stein, no discretion remains in the Circuit Court under the opinion of the Supreme Court of Alabama and when the case would be set for trial in the Circuit Court the only course such Court could follow would be to enter judgment for the Plaintiff under the agreed statement of facts, which would be purely a ministerial function. Under these circumstances, this Court has held that the judgment of the Supreme Court of Alabama is final within the meaning of the statute.

In the case of Rio Grande Western Railroad Company v. Stringham 239 U. S. 44, the railroad company filed a suit to quiet title to certain land to which the defendants asserted title. At the trial the facts were specially found and judgment for the defendants was entered upon the findings. The Supreme Court of the state, accepting the findings below, held that the plaintiff acquired a right-of-way through the lands afterwards embraced in the claim owned by the defendant and that the defendant's title was subject to the right-of-way and thereupon reversed the judgment and remanded the case with the direction to enter a judgment awarding to the plaintiff title to a right-of-way over the lands in question. Acting upon this direction the trial court vacated its prior judgment and entered another, adjudging the plaintiff to be the owner of a right-

of-way through the land in question. The plaintiff again appealed, insisting that it was only adjudged to be the owner of a right-of-way when, according to the true effect of the right-of-way act, it had a title in fee simple. The Supreme Court of the state affirmed the lower court, and the Rio Grande, being in doubt as to which of the judgments was the final judgment, appealed from both. The Supreme Court held that the first judgment was the final judgment saying:

> "Manifestly the first judgment was final within the meaning of Judicial Code Section 237. It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court."

If we followed the procedure of the Rio Grande and allowed a judgment to be entered against Stein in the trial court from which we prosecuted an appeal to the Supreme Court of Alabama and then to this court, such an appeal would be dismissed for want of jurisdiction under the Rio Grande case, because the final judgment was the judgment of the Supreme Court of Alabama which reversed and remanded the case to the Circuit Court for action in accordance with the opinion handed down by the Supreme Court.

We are confident that none of the statements made with reference to the finality of the judgment will be questioned by the State of Alabama, and it is our understanding that the State concurs that such judgment is final.

STEIN'S COURSE OF CONDUCT CONSTITUTED INTERSTATE COMMERCE

POINT 2.

The question as to whether a fixed-sum license tax on one who negotiates contracts for the sale of merchandise between non-residents of a state and residents of such state, where the merchandise which is the subject of the solicitation is without the state at the time of solicitation, constitutes a violation of the commerce clause has been presented to this Court on many occasions.

In every instance the United States Supreme Court has held that such a course of conduct constituted interstate commerce.

It is true that Stein has two ways of conducting business. In the majority of cases he obtains orders from resident wholesale grocers and transmits those orders to his non-resident principals who fill them by shipment direct to the local wholesale grocers. In some instances, where the freight rate would be reduced by such procedure, he will send in an order for an entire carload lot whereas, as a matter of fact, he will not have sold the entire carload lot.

We shall deal first with the question as to whether the securing of orders for his non-resident principals constitutes interstate commerce, and then we shall discuss the question as to whether placing an order for an entire carload lot, under the cir-

cumstances set out herein, takes this case from without the protection of the commerce clause.

One of the leading authorities on this subject is of course the case of Robbins v. Taxing District of Shelby County, 120 U. S. 498. In that instance, Robbins was engaged in the City of Memphis, Tennessee, in soliciting the sale of goods for the firm of Rose, Robbins & Company of Cincinnati, Ohio. There was in force a statute of Tennessee, by which it was enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district offering for sale, or selling, goods, wares or merchandise therein by sample, shall be required to pay to the County Trustee the sum of Ten Dollars per week or Twenty-five Dollars per month for such privilege; and no license shall be issued for a longer period than three months."

Robbins would attempt to secure orders for his non-resident firm and then send such orders into the firm, which of course, would fill them. Robbins refused to take out the license required by the statute claiming the statute was unconstitutional. The mind of the Court was clear to the conclusion that Robbins was engaged in interstate commerce for it said:

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce."

Thereafter the Court proceeded to hold the tax invalid because it was a burden on interstate commerce.

There is little difference between the business activities of Stein and of Robbins, the major difference of course being that Robbins represented only one principal and Stein represents thirteen, and more of this difference will be said later.

In the case of Crenshaw v. Arkansas, 227 U. S. 389, Crenshaw was an agent for a range manufacturer. The manufacturing company was located in St. Louis, Missouri, and Crenshaw was a salesman for such company working in Arkansas, and he procured orders for such ranges which were sent to the company in St. Louis and such orders were filled by delivery to the purchaser. The State of Arkansas passed an act levying a tax upon such operation. This Court flatfootedly passed on the question as to whether such activities constituted interstate commerce and said in the opinion that:

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."

Stein is engaged in negotiating the sale of merchandise which is located in another state, the intention being to introduce such merchandise from the state of the non-resident principal into the State of Alabama, and Stein likewise must be engaged in interstate commerce.

The case of Disanto v. Pennsylvania, 273 U. S. 34, lays down the same principle of law. There Disanto was engaged in selling tickets and orders for transportation as agent of certain steamship companies. The state levied a license tax on such an occupation. The plaintiff represented four steamship companies operating steamships between the United States and Europe, and he sold tickets and orders for transportation for each of said companies. Disanto refused to pay the license and was prosecuted for violation of the act. The question naturally and necessarily arose as to whether he was engaged in foreign commerce. Mr. Justice Butler answered the question as follows:

> "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce."

The case whose facts fit more closely with the instant case is that of Stockard v. Morgan, 185 U. S. 27, in fact, there is no difference whatsoever between the facts in the Stockard Case and the facts in this case. Stockard was engaged in business in the City of Chattanooga and represented non-residents of the State of Tennessee and solicited orders for merchandise from jobbers or wholesale dealers in Chattanooga, and upon such orders being obtained sent them to his non-resident principal or principals. If the order be accepted, the goods are shipped by the non-resident principal to the local jobber or wholesaler.

Up to the time of sale the goods, in all instances, belong to the non-resident principal and are shipped to the State of Tennessee from another state. At the end of each month Stockard is paid a commission based on the orders sent in by him and accepted by the non-resident principal. It will therefore be seen that the business activities conducted by Stockard were identical with those conducted by Stein. The state raised the question that because Stockard represented more than one non-resident principal, he was engaged in a local business and not in interstate commerce, but the Court denied the validity of this argument by saying:

> "It is still a **carrying on of interstate commerce** whether the party is acting for one or more principals residing outside of the State and selling their goods through his procurement, acting for them as their agent."

And again:

> "When the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce."

It seems so evident that the activities of Stein thus far discussed constitute interstate commerce that we shall not burden the Court with additional arguments or additional citations in an effort to establish this principle of law.

Let us therefore proceed to the other portion of Stein's activities, viz. sending in an order for an

entire carload lot where the freight rate would be reduced and where he has not sold the entire carload lot. In order to be certain as to the exact procedure followed by Stein, let us refer to the agreed statement of facts. The following is a pertinent quotation therefrom:

> "If defendant procures an order or orders for less than a carload lot of a commodity on which the freight rate would be lessened by the shipment of a carload lot, the defendant will send in an order for a carload shipment of the particular commodity and the carload will be shipped to the particular jobber who has the largest portion of such car, or to the defendant.
>
> "The defendant attempts to dispose of the unsold portion of the carload lot prior to the arrival of the shipment, and in the majority of cases is able to do so. If an order is not procured for the unsold portion of the merchandise by the defendant prior to its arrival, it will be stored by him and subsequently sold." (R. 6).

The State has argued that the non-resident principal in such cases sends the goods into the State of Alabama on consignment, and that when Stein sells such goods the license levied on him does not place a direct burden on interstate commerce but only an indirect burden, and therefore the license, being non-discriminatory, is valid.

We respectfully submit that there is nothing contained in the agreed statement of facts which would justify such a construction being placed on Stein's activities. It will be noted that in all such

instances Stein sends in an order to the non-resident principal. An order necessarily presupposes a sale. So far as the non-resident principal is concerned, upon receipt of such order, he would not know that the entire carload had not been sold. The shipment is made either to the purchaser who has bought the largest portion of the car, in which instance the order for the portion of the car unsold, as far as Stein is concerned, will be made out in the name of the largest purchaser, and in this event the largest purchaser would be liable to the non-resident principal for the purchase price thereof, or it is made to Stein; and if the order be sent in Stein's name, it constitutes a direct sale from the non-resident principal to Stein, and Stein would be liable for the purchase price thereof.

Stein, in disposing of his own goods, would not render himself liable for a broker's license. A broker is one who negotiates sales for others, and while by selling his own goods he might render himself liable for a license, it would have to be under some other section of the license schedule and not under the section providing for a license on "merchandise brokers or commission agents."

Under the above facts, either the largest purchaser orders the goods, or Stein orders them. If the largest purchaser orders them, the transaction would come within the influence of the cases hereinbefore cited and would constitute interstate commerce. If the order is sent in by Stein, it is a direct sale to Stein, and the disposal of the goods by Stein

would not constitute him a merchandise broker or commission agent because he would be selling his own goods.

The State, in support of its contention, has argued that the agreed statement of facts recites that Stein is engaged in negotiating contracts for the sale of merchandise and therefore is in the brokerage business and would not purchase goods on his own account. Such a construction of the agreed statement of facts seems very strained in the light of the circumstance that the agreed statement of facts also states that Stein, besides his brokerage business, operates in this other fashion.

The contention is also made that because the agreed statement of facts recites that Stein receives no remuneration other than his commissions, therefore he is paid on a commission basis for handling transactions of the character which we are presently discussing; but again the agreed statement of facts set up two sorts of activities in which Stein engages and if the largest purchaser orders the balance of the car, he would undoubtedly be paid a commission, and if he himself purchases the merchandise, it is possible that his non-resident principals might allow him a commission, but it is also possible that they may not. If they do allow him a commission, he makes the commission plus any profit realized on the sale of the goods. If he makes no commission, he realizes only the profit on the sale of the goods, but in either event the fact still remains true that he is paid only by way of commissions for his activities in representing a non-resident principal.

It will be noted that the agreed statement of facts states that all orders procured by Stein are subject to approval by the non-resident principal, and if the non-resident principal accepts the order and ships the goods, someone in the State of Alabama is liable to him for the purchase price of said goods and that someone is the party in whose name the goods are ordered. In order to interpret the facts as contended for by the State, the words "on consignment" would have to be read into the agreement and nowhere in the agreement are these words contained, nor are there any other facts recited in the agreement from which the words "on consignment" might be implied. There seems to us to be nothing peculiar in the nature of the activities in which Stein engages. Certainly, it is to his interest to sell even less than a carload lot, and if he can make such a sale attractive to the prospective purchaser by reducing the freight rate, he thereby increases his commission, and we daresay that this practice is engaged in by substantially every brokerage firm that has the necessary finances to render such activity possible. It is purely an activity which promotes his brokerage business.

If the non-resident principal accepts the order which is sent to him, and ships the goods in conformity thereunto, certainly the non-resident principal can expect payment from the person in whose name the order is placed. If Stein was not able to dispose of the goods, someone would have to pay the non-resident principal and it would be the person who sent in the order, viz. either Stein or the largest purchaser.

Certainly, it would be no defense if the non-resident principal sued the largest purchaser for the largest purchaser to say, "I did not purchase all of these goods. I had an agreement with Stein that they would be shipped to me and he would dispose of that portion which I did not buy." Likewise, it would be no defense on the part of Stein to say, "Yes, I sent in an order but I did not have the goods sold."

The very reason why non-resident principals use brokerage firms is because they do not wish to send their goods into other states and incur the cost of so distributing them on the possibility that a sale might be effected when the goods reach the other state. True, many large manufacturing concerns have their own warehouses in other states, but this is not necessarily so as is evidenced by the fact that brokerage firms exist in large numbers throughout the United States, thereby establishing the fact that many manufacturers are not willing to send their goods into distant states on consignment. If Stein's principals were willing to send their goods into Alabama on consignment, there would be no reason for their using Stein's services.

However, this particular activity of Stein's be construed, it can have no effect on the question as to whether he is engaged in interstate commerce. Either the sale is made to the largest purchaser and interstate commerce results, or the sale is made to Stein and his resale of his own goods would not render him liable for a broker's license.

Lest it be contended that the Supreme Court of the United States must accept the construction placed on Stein's activities by the Supreme Court of Alabama, viz. that he is engaged in intrastate commerce, we wish to call to the attention of the Court the fact, that not only the right, but the duty as well, exists in this Court to examine the facts under certain circumstances. In the case of United Gas Public Service Company v. the State of Texas, 303 U. S. 123, 625, this Court held that the Supreme Court will review findings of fact by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts.

And again in the case of Norris v. the State of Alabama, 294 U. S. 587, this Court held that where a federal right is specifically claimed in a state court, the United States Supreme Court must inquire whether such right was denied, not merely in express terms but also in substance and effect, and, if necessary, evidence must be examined.

This must necessarily be the rule, as otherwise the state court would have the right to deny to the United States Supreme Court the right to pass on a federal question by the construction it gives to the agreed facts.

If the Supreme Court of Alabama had the right to construe the agreed facts in Stein's case and say

that such did not constitute interstate commerce, it could deny to the Supreme Court of the United States the right to pass on this question.

THE FIXED SUM LICENSE DIRECTLY BURDENS INTERSTATE COMMERCE AND IS THEREFORE VOID.

POINT 3-A

Feeling confident that we have established the fact that Stein's activities constitute interstate commerce, let us examine the law with reference to whether the license tax exacted is such a burden on interstate commerce as to render the statute void. There have been many decisions of this Court construing the validity of licenses which are claimed to infringe the commerce clause, and while some of these cases might seem to be in conflict, we confidently assert that if they be carefully examined it will be found that the rules of law laid down therein do not contradict each other.

In the case of Texas Transport & Terminal Company v. The City of New Orleans, 264 U. S. 150, Mr. Justice Brandeis in a dissenting opinion stated the following criterion for determining the validity of such taxes:

> "From the multitude of cases this general rule may be educed. The validity of a state tax under the commerce clause does not depend on its character or classification. It is not void merely because it affects or burdens interstate

commerce. The tax is void only if it directly burdens such commerce, or (where the burden is indirect) if the tax discriminates against or obstructs interstate commerce."

The rule is therefore laid down that:

1. The tax is void if it directly burdens interstate commerce.

2. If it indirectly burdens interstate commerce and is discriminatory, it is likewise void.

Perhaps, because this criterion was expressed in a dissenting opinion, it might be asserted that its validity is lessened, but that such a statement has no merit is shown by the case of McGoldrick v. Berwind-White Coal Company, 309 U. S. 33, recently decided and involving the validity of the sales tax law levied by the City of New York. This Court in the Berwind-White Case said as follows:

"Forms of state taxation whose tendency is to prohibit the commerce, or place it at a disadvantage, as compared with or in competition with intrastate commerce, and any tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner because of its obvious regulatory effect upon commerce between the states."

Paraphrasing this quotation, it might read:

Forms of state taxation whose tendency is to prohibit the commerce, or place it at a dis-

advantage as compared or in competition with intrastate commerce, that is to say, those forms of taxation which directly burden the commerce, and any tax which discriminates against commerce, that is to say, any tax which indirectly burdens interstate commerce and discriminates against it, is void."

So that the substance of the rule laid down by Mr. Justice Brandeis and by the Court in the Berwind-White case are exactly the same.

Let us examine applicable cases which have been cited by Stein, and likewise which have been cited by the State in the light of the above standard, and let us see if the license levied by the State of Alabama falls within either classification. It is difficult to conceive how any state could tax the act which initiates interstate commerce without placing a direct burden on such commerce. If a state can tax the act which initiates interstate commerce, it can prohibit such act and if it can prohibit such act, it must necessarily follow that it directly burdens or affects interstate commerce.

The Robbins Case, supra, decrees that a license placed on one who is engaged in negotiating the sale of goods between a resident of the state in which he solicits and a resident of another state is void where the merchandise which is the subject of the sale is without the state in which the purchaser resides and will be shipped from the non-resident manufacturer to the local purchaser. The facts in the Robbins Case have heretofore been set out, and the only difference between the Robbins Case and the

activities engaged in by Stein is that Robbins represented only one non-resident principal and Stein represents thirteen. This feature will be discussed a bit later. This Court held that the tax on Robbins constituted a direct burden on interstate commerce. The opinion contains the following observation:

> "If he (Robbins) may be taxed by such state for doing so (that is soliciting orders for a non-resident principal) who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things."

Then, it may be admitted that such a tax places a burden on interstate commerce, but so far at least the Court has not said that the burden was such a direct burden as to render the tax void within the standards heretofore set out. However, this question is answered by the following observation:

> "It is strongly urged as if it were a material point in this case that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state. The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."

In other words, the Supreme Court said that even though the tax is non-discriminatory, it is still void because it taxes interstate commerce; but it could only be void if it were a non-discriminatory tax where it places a direct burden on interstate commerce. Therefore, since the Supreme Court held the tax void and also non-discriminatory, it must be a direct burden on interstate commerce.

It has been admitted by the State throughout the proceedings in this case that the law laid down in the Robbins Case is valid law, and the State has attempted to explain away the applicability of this case by saying that the tax levied by the State of Tennessee was discriminatory and the tax levied by Alabama is non-discriminatory. The tax levied by Tennessee applied to "all drummers and all persons not having a regular licensed house of business in the taxing district" and the State has assumed that this was a discriminatory tax in that it did not apply with equal force to the residents and non-residents; but, as a matter of fact, a resident of the State of Tennessee who solicited without a licensed house of business was equally as liable for the tax as was a non-resident of Tennessee who solicited under like circumstances, and therefore the license applies with equal force to either residents or non-residents. The determining factor is not whether one is a resident or non-resident, but whether one maintains a licensed house of business.

As will be noted from the quotation in the Robbins Case last above, the State asserted that the non-discriminatory character of this license was its saving grace, but the Supreme Court said, in effect, that even if the license be non-discriminatory in this regard it is still void because it burdens interstate commerce—and the Court proceeded in the opinion to demonstrate that even though the license was non-discriminatory in the particular discussed, it was even so a discriminatory tax because:

> "It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminatory against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers in Memphis have a regular licensed house of business there and no occasion for such agents; and if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis."

This is true not only in the Robbins Case, but it is true in any case where the license places a direct burden on interstate commerce, and that is the reason why licenses which place a direct burden on such commerce are void because they either discriminate against or prohibit interstate commerce.

Applying the law laid down in the Robbins Case to Stein and assuming for the moment that the representation of thirteen non-resident principals instead of one is immaterial, no distinction can be made between the condition of Robbins and Stein. Both were engaged in soliciting orders for non-resident principals. Such orders were forwarded to the non-resident principals who filled them by shipment direct to the purchaser. In the Robbins Case the license was held to be a direct burden on interstate commerce, and therefore the license levied on Stein is a direct burden on interstate activities. As is further illustrated by the opinion, even though this were not the law it is easy to conceive that such a tax discriminates against interstate commerce in that the agents of such non-resident firms are taxed for doing business in Alabama, whereas the local manufacturers in Alabama are not taxed because there is no need in their instance for such an agent.

Lest, perhaps, it be argued that Stein represented thirteen principals and was therefore different from Robbins, let us examine the facts and the holding in the case of Stockard v. Morgan, supra, the facts of which case have been set out fully hereinbefore. It will be remembered that Stockard represented numerous non-resident principals and did business in exactly the same fashion as Stein conducted his activities, and under these circumstances the Supreme Court held that the license tax laid on Stockard was void. The Robbins Case was argued as an authority for the decision, and the State attempted to explain away the law of the Robbins Case by

saying that Stockard was actually engaged in the brokerage business in that he represented numerous principals instead of one. This argument was denied and this Court said:

> "If, while so acting and soliciting orders within the State for the sale of property for one non-resident of the State, the person so soliciting was exempt from taxation on account of that business because the tax would be upon interstate commerce, we do not see how he could become liable for such tax because he did business for more than one individual firm or corporation, all being non-residents of the State of Tennessee."

And it has been contended by the State that Stein is engaged in a local business, and therefore the license tax is one not on interstate commerce but on the local business. This same argument was made in the Stockard Case, and the logic in the same was refuted when this Court said:

> "The fact that the State or the Court may call the business of an individual, when employed by more than one person outside of the State to sell their merchandise upon commission, a brokerage business, gives no authority to the State to tax such a business as Complainant's. The name does not alter the character of the transaction, nor prevent the tax thus laid from being a tax on interstate commerce . . . it is still a carrying on of interstate commerce whether the party is acting for one or more principals residing outside the State and selling their goods through his procurement, acting for them as their agent . . . it is in effect a tax upon

interstate commerce and that fact is not in anywise altered by calling the tax one upon the occupation of an individual residing in the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce under whatever name it may be designated."

The license levied in the Stockard Case was a non-discriminatory license in the sense that it applied to residents and non-residents alike, and there can be no distinction made in the facts in this case and in the Stein Case. In fact, the State has frankly stated that the facts in these two cases cannot be differentiated and have said that the law as laid down in the Stockard Case is not good law and is in conflict with the law laid down in the case of Ficklen v. Taxing District of Shelby County, 145 U. S. 1, and that the Supreme Court of the United States has, in recent cases, approved the holding in the Ficklen Case by citing it in various of the recent opinions of the Court.

It is submitted that there was a great difference in the Ficklen Case and in the Stockard Case. In the Ficklen Case a license was levied for the privilege of engaging in business as a merchandise broker and a flat sum was levied at the beginning of the year. At the end of the year an additional sum was payable based on the amount of business done by each broker. The flat sum due at the beginning of the year was paid and when the end of the year arrived the defense was asserted that the broker had, in fact, represented only non-resident principals during the entire year and therefore the tax as ap-

plied to him was void; but the Court held that the broker in the Ficklen Case was liable for the license, the logic of the opinion being that inasmuch as he had paid the fixed-fee portion of the license and held himself open as being engaged in the merchandise business and therefore willing to represent any principals, he could not be heard to say that because he represented only non-resident principals in that particular year, he was therefore not liable for the license.

This distinction between the Stockard and Ficklen cases is very clearly discussed and illustrated by Mr. Justice Brewer in the opinion in the case of Brennan v. City of Titusville, 153 U. S. 289. In the Brennan Case the City of Titusville levied a license tax on "all persons canvassing or soliciting within said City orders for goods . . . or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited shall be required," etc.

Brennan was an agent of an Illinois manufacturer and he solicited orders for picture frames, and upon receiving orders for such they were forwarded to the manufacturer in Illinois and from there shipped to the agent of the manufacturer in Pennsylvania for delivery. The license was held void because it placed a direct burden on interstate commerce. The Ficklen Case was cited as authority to the contrary and the following distinction between the Ficklen Case and the Brennan case was drawn:

"The case of Ficklen v. Shelby County Taxing District is no departure from the rule of decision so firmly established in the prior cases... Plaintiff's contention was that as to one of them, all, and as to the others, most, of their commissions were received on sales of goods forwarded by non-resident parties. On that ground they refused to perform the stipulation of their bonds. It was held that the tax was an entirety and was not affected by the variable and adventitious results of business from year to year. It could hardly be contended that if the license tax exacted in advance for the privilege of engaging in such business was a fixed sum, a party paying the tax could, on a failure to secure and to do any business, recover the tax so paid, for the tax is not for the business done but for the privilege of engaging in business. So, when the Plaintiffs in that case applied for their licenses at the beginning of the year they assumed the whole liability imposed by the State. That all of it was not paid at once did not affect the measure of liability. Suppose the tax, a fixed sum, had been payable one-half at the commencement and the other half at the close of the year, would it be thought that having paid the first half at the commencement of the year, they could resist payment of the second half on the ground that half of their commissions were received on goods shipped from outside the State? In other words, the tax imposed was for the privilege of doing a general commission business within the State and whatever were the results pecuniarily to the licensees or the manner in which they carried on business, the fact remained unchanged that the State had, for a stipulated price, granted them this privilege. It was thought by a majority of the Court

> that to release them from the obligations of their bonds on account of the accidental results of the year's business was refining too much, and that the Plaintiffs, who had sought the privilege of engaging in a general business, should be bound by the contracts which they had made with the State therefor."

In other words, the broker in the Ficklen Case held himself open as being willing to represent both resident and non-resident principals, and the accidental circumstance that he represented only non-resident principals in that particular year could not excuse him from liability for the license tax.

Such was not the case in Stockard v. Morgan, nor is it the case here. Stein, according to the agreed statement of facts, only holds himself open as negotiating contracts with the wholesale grocers and non-resident principals represented by him, and he is not willing to represent any principals unconditionally and does not so hold himself out. The result is that a very great difference exists in the facts in this case and the Ficklen Case.

The case of Texas Transport & Terminal Company v. the City of New Orleans, 264 U. S. 150, involved a similar set of facts. There, the City of New Orleans levied a license tax upon the business of being a steamship agent. The defendant was regularly employed as an agent for four steamship lines, and in addition defendant occasionally represented other ship owners. All were exclusively engaged in interstate or foreign commerce, the services rendered consisting of soliciting and engaging cargo,

nominating ships for carrying it, arranging for its delivery at the wharf, issuing bills of lading under the name of the ship owner or charterer, arranging for stevedores for loading and discharging cargo, collecting freight charges, paying ship's disbursements, attending to immigration services and assisting generally in matters of local customs and regulations. This Court ruled the tax void saying in its opinion:

> "This Court has had frequent occasions to consider and determine the effect of taxes of the same general character as that here involved, and for present purposes we find it unnecessary to do more than refer to the general and well-established rule which is that a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state prior to their introduction therein, or to impose a tax upon persons for securing or seeking to secure transportation of freight or passengers in interstate or foreign commerce."

This tax was likewise a non-discriminatory tax in that it applied to steamship agents of all classes, and the statute was held unconstitutional because it placed a direct burden on commerce.

None of these cases can be distinguished from the Stein Case. One might go on and cite a great many cases involving these same principles of law. We feel, however, that sufficient has been said to demonstrate the fact that the tax levied by the State of Alabama on merchandise brokers places a direct

burden on Stein and is therefore void, and we shall only refer to one other case dealing with this particular question and that is the case of **Best & Company v. Maxwell,** 61 S. Ct. 334 (advance sheet) which was decided on December 23 last. The State of North Carolina levied an annual privilege tax on "every person, not a regular retail merchant in the State, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." Appellant was not a regular retail merchant of North Carolina and admittedly comes under the terms of the statute. Mr. Justice Reed, writing the opinion for the Court, held that the statute was discriminatory, and since it must fail of its purpose if it is discriminatory, irrespective of whether it be a direct or indirect burden on interstate commerce, it was not necessary for the Court to proceed further and determine whether the tax directly or indirectly burdened the commerce. The case illustrates, however, the fact that the course of conduct followed by Stein amounted to interstate commerce.

3-B

ILLUSTRATIONS OF INDIRECT BURDENS ON INTERSTATE COMMERCE.

We should like to discuss the cases which have been cited by the State and on which the opinion of the Supreme Court of Alabama seems to be based. With the greatest respect for the Supreme Court of Alabama, we respectfully but confidently express

the belief that it can be demonstrated that all of these cases come within the second division of the standard or criterion set for determining the validity of license taxes by this Court; that is to say, it will be found that the burden placed on interstate commerce by the statute in each of these instances was an indirect burden and therefore, as such, only rendered the statute unconstitutional if discriminatory.

One of the cases from which the State quoted in extenso is the case of McGoldrick v. Berwind-White Coal Company, supra. It is respectfully insisted that if this case be examined, it will be found that it contains a very full, yet concise and easily intelligible statement of the law with reference to licenses affecting interstate commerce. As the Court knows, this case involved the validity of the Sales Tax Act levied by the City of New York and which taxed the transfer of title or possession or both of merchandise where the same took place in the City of New York. Berwind-White Coal Company shipped orders of coal from the State of Pennsylvania to consignees in the City of New York, and of course title or possession or both passed in the City of New York, and consequently the State claimed that the sales tax applied. The defense was set up that such a tax placed an undue burden on interstate commerce and was therefore void.

In the Berwind-White Case Mr. Justice Stone recognized the fact that a tax imposed by the state of the buyer upon **a sale of goods** effected by delivery to the purchaser upon arrival at destination after an interstate journey was valid, and likewise

recognized the validity of a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale, but nowhere does the opinion state that this Court has recognized the validity of statutes which tax the very act which attempts to initiate interstate movement. Certainly, sales taxes in the state of the buyer on goods which have been shipped into that state by interstate movement do not directly burden interstate commerce. The reason is evident. In the first place, the thing taxed is not interstate commerce but the sale of goods and the interstate movement has been completed. No act is taxed in such a case which could directly affect interstate commerce, whereas in Stein's instance the tax is laid on his efforts to initiate an interstate commerce movement.

In the instance where a fixed-sum license is imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale, the merchandise has already been shipped into the state of the buyer and the agent has possession of the goods at the time he attempts to make the sale. Whereas, in the Stein Case the merchandise is in the possession of the nonresident principal when Stein attempts to make the sale. There is no direct burden placed on interstate commerce because the interstate movement has been completed and the merchandise has come to rest in the state of the buyer. So the tax can only affect such commerce indirectly. Whereas, in Stein's instance, the merchandise has not been introduced in-

to the state at the time the sale is solicited and if Stein's actions be curtailed or prohibited, interstate commerce will cease as to this particular form of movement. Where the merchandise is in the state of the buyer at the time the sale is solicited, the activity of the agent might be lessened or prohibited without affecting interstate commerce, because such movement has already been completed and thus the effect could only be indirect.

And so it is with the sales tax levied by the City of New York. The tax is not on any interstate movement, but it is on the transfer of title or possession of the merchandise within the City of New York; and even if such merchandise has arrived in New York by way of interstate commerce, the movement in interstate commerce has been completed and the merchandise has come into the State of New York, and any tax that is placed on the merchandise after its arrival in New York which would decrease the number of such sales, would not affect interstate commerce directly because the commerce would already have taken place and the burden thus placed on the commerce would be indirect. Inasmuch as the tax levied by the City of New York was non-discriminatory, it was therefore held to be valid and rightly so.

This case did not lay down any new law, as the State of Alabama and the Supreme Court of Alabama apparently felt. Nor did the case of Graybar Electric Company v. Curry, 238 Alabama 116, 189 Southern 186, Application for Certiorari denied and dismissed by the Supreme Court of the United

States, 208 U. S. 513, which we will discuss later, lay down any new law. The State of Alabama argued, and apparently the Supreme Court of Alabama felt, that the case of Stockard v. Morgan had been overruled at least by indirection by the Berwind-White Case; but that this is not so is shown by the following portion of Mr. Justice Stone's opinion:

> "But unless we are now to reject the plain teaching of this line of sales tax decisions extending back for more than seventy years from Graybar Electric Company v. Curry . . . to Woodruff v. Parham, the present tax must be upheld. As we have seen, the ruling of these decisions does not rest upon precedent alone—it has the support of reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales, emphasis was placed on the circumstance that they were not so laid, measured, or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of the state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce."

Thus, it will be seen that the law laid down in the Berwind-White Case was not new law, but extended back for at least seventy years, and it will be noted that the Court called attention to the basis on which these taxes had been sustained and gave as the reason for their validity the fact that they were not so laid, measured, or conditioned as to af-

ford a means of obstruction to the commerce (that is, to place a direct burden on commerce) or to discriminate against it (that is, where the burden was indirect) and this portion of the opinion again illustrates that the criterion or standard for judging the validity of these license taxes has not been changed.

The Court in the Berwind-White Case thus held that in the cases of Graybar Electric Company v. Curry, Woodruff v. Parham, 8 Wall. 123, and Hinson v. Lott, 8 Wall. 148, the tax was not so laid, measured or conditioned as to afford a means of obstruction to the commerce—that is, it did not directly burden commerce and since the burden, if any, was indirect and since the tax was non-discriminatory, it was therefore valid.

None of these conditions exist in the Stein Case. It is respectfully insisted that the burden placed on interstate commerce is direct and thus it is immaterial whether the tax on Stein is discriminatory or non-discriminatory.

In the case of Woodruff v. Parham, 8 Wall. 123, the City of Mobile levied a license on sales of merchandise in the City of Mobile. Plaintiff in Error acted as auctioneer and commission merchant and sold a large amount of goods for others, such goods having been brought into the State of Alabama from other states of the Union. This brings this case within the influence of the Berwind-White Case. The interstate movement had already taken place—whatever tax was placed on the sale of the goods could

not affect such movement directly and such effect, being indirect only, the tax was valid if non-discriminatory, and since the tax applied with equal force to residents and non-residents of Alabama, it was non-discriminatory and was therefore held valid.

The same facts existed in the case of Hinson v. Lott, 8 Wall. 148. The statute made it unlawful for any dealer in spirituous liquors to sell the same without paying a tax of fifty cents per gallon. The Plaintiff in Error had had shipped to him from other states in the Union the liquors in question, but since the tax only applied after the interstate movement had been completed and was laid upon the sale of the liquors, upon arrival in the State of Alabama, there could be no direct burden on the commerce and since the license was non-discriminatory, it was therefore valid.

The Supreme Court of Alabama apparently relied to a large extent on the Graybar Case, and in the opinion in the Stein Case the Alabama Supreme Court said:

> "The electric company (Graybar) solicited orders for equipment direct from out-of-state manufacturers, who shipped the goods direct to the customer within the State. Payment was made by the customer to Graybar."

We respectfully submit that an examination of the facts in the Graybar Case will show that such conditions did not exist. There were four different sets of facts in the Graybar Case, and we will con-

sider each set of facts and show to the Court that in no one of these circumstances did Graybar solicit orders for any non-resident manufacturer, but on the contrary it solicited orders for itself, it maintaining a branch house or warehouse in the City of Birmingham, Alabama. Please note in the Graybar Case the copy of the order signed by the resident consumer. It is directed to "Graybar Electric Company, 1529 First Avenue North, Birmingham, Alabama."

The set of facts in Class A shows that the order was directed as above set out, and that Graybar on receipt of such order from a resident of Alabama would, itself, order from General Electric Company located in Ohio the merchandise required and instruct General Electric Company to ship the same f.o.b. factory in Ohio to the purchaser in Fairfield, Alabama. General Electric Company billed Graybar Electric Company, and Graybar Electric Company billed the customer. The facts plainly show a sale from General Electric Company to Graybar Electric Company, and a sale in turn by Graybar Electric Company to the purchaser in Alabama. The sale which was taxed by the Sales Tax Act was the Alabama sale, viz. from Graybar Electric Company to the resident purchaser, and the tax on such sale admittedly must be valid.

This was the position taken by Judge Knight in the opinion when he said:

> **"The transactions were Alabama sales within the provisions of the Alabama Sales Tax Law."**

They could be construed in no other light. Graybar obtained an order made out to itself. It, in turn, ordered from General Electric Company the merchandise in question. Could it be said, under these circumstances, that General Electric Company could have sued the local purchaser for the purchase price of the articles in the event that Graybar Electric Company had refused to pay for them? There would be no evidence whatsoever to establish any sale from General Electric Company to the local purchaser.

Class B. The sales represented by Class B in the Graybar Case were exactly the same as Class A with one exception. The order to Graybar in Class A contained a provision that the goods should be manufactured outside the State of Alabama and shipped in interstate movement into Alabama. No such provision was contained in the orders represented in Class B, and therefore what has been said with respect to Class A applies with greater force to Class B.

The sales represented in Class C were made as follows: Graybar obtained an order directed to itself and if the goods required by such order were not stocked by it in its Birmingham warehouse, but were stocked by it in its Atlanta warehouse, the goods so ordered were shipped out of the Atlanta warehouse direct to the local customer. Needless to say, the same condition exists in this class of sales as existed in Class A—that is to say, Graybar made a contract with the local customer and Graybar, in order to fill such order, directed its Atlanta office to ship the merchandise direct to the customer, but

there was no contract between the Atlanta warehouse with Graybar and the customer. There was a local contract between Graybar in Birmingham and the customer, and the sale from Graybar in Birmingham to the customer was a local sale.

Class D. The sales represented is Class D were the same as Class B except Graybar carried in stock in its Birmingham warehouse the merchandise so ordered, but instead of filling the order from this merchandise, it procured the same from a non-resident manufacturer. The order in all cases was directed to Graybar Electric Company and the contract in all cases was between Graybar Electric Company and the local consumer. That this is true is shown by the opinion of the Court which says:

> "As to the sales included in Classes B, C and D, the evidence shows that the Complainant (Graybar) was in fact and truth the seller; that its place of business was in Birmingham, Alabama; that it was at this place the Complainant accepted the purchasers' orders for the goods; that the purchasers and ultimate consumers were residents of Alabama; that the goods contracted to be bought of the Complainant were to be delivered to them in Alabama; and that the goods were paid for by the consumer to the Complainant in Alabama. **The sales were Alabama sales.**"

Let us examine the facts in the Stein case and see if they bear any relation to the facts in the Graybar Case. In the first place, the contract in the Stein Case is between a non-resident principal and the

local consumer, whereas in the Graybar Case it was between Graybar, a Birmingham concern, and a local consumer. In the Stein Case the non-resident principal accepts the purchaser's order at its place of business in some state other than Alabama, whereas the very reverse exists in the Graybar Case. There is no contract between Stein and the local consumer. The contract is between a non-resident of Alabama and a resident of Alabama. How can it be said that such a contract is not one of interstate commerce? Stein's services are completed when the order is obtained and sent to the non-resident principal. The non-resident principal does not look to Stein for payment, whereas the non-resident manufacturer did look to Graybar for payment, clearly showing a sale from the non-resident principal to Graybar.

It will thus be seen that the sales in the Graybar Case were from one Alabama concern to another and admittedly must be construed as intrastate sales, whereas the sales in the Stein Case were between a non-resident and a resident of Alabama, an entirely different situation, which we respectfully insist must be construed as an interstate commerce transaction.

The Feld Case (Curry v. Feld, 283 Ala. 255, 190 So. 88) is also relied on as authority for the position taken by the Supreme Court of Alabama. The facts in the Feld Case and in the Graybar Case were very similar. In the Feld Case, Feld represented a North Carolina concern and obtained orders for cigarettes in the City of Birmingham, which orders were for-

warded to the North Carolina concern for fulfillment; but the shipment was made by the North Carolina concern to Feld, who in turn delivered the cigarettes in question to the purchaser. Payment for such cigarettes to the North Carolina concern was to be made by Feld, and the North Carolina concern looked to Feld for the payment for the cigarettes shipped. Thus, in effect, two contracts of purchase existed—one between the North Carolina concern and Feld, which is an interstate contract, and one between Feld and the local consumer, which is an intrastate contract; and the latter contract is the one to which the sales tax applies, and since it is admittedly an intrastate contract, the tax is valid. This was the position taken by Judge Thomas in the Feld opinion when he said:

> "As we view the evidence and issues of facts presented by the pleading, all the sales in question were intrastate."

It seems to us that even in the light of the construction placed on Stein's transactions by the Court, it has overlooked one all-important feature. Let us assume that the transactions handled by Stein are the same as those set out in the Graybar and Feld cases. If this be true, admittedly a sales tax on such transactions would be valid, because the burden would be indirect and the tax non-discriminatory. But the question involved in the Stein Case is not whether a sales tax applies, but whether a fixed-sum license tax can be levied on merchandise brokers or commission merchants.

Either one of two situations exists—that is to say, either the non-resident principal sells direct to the local consumer and Stein acts as a broker, and in this event this transaction is an interstate one and the license is void as applied to Stein, because a direct burden on interstate commerce, or the non-resident principal sells to Stein and Stein sells to the local consumer.

In the latter case, Stein is not liable for the license tax in question because he would not be a merchandise broker or a commission agent. A broker is one who negotiates contracts between two principals without having in his possession the subject matter of the contract; whereas, a commission merchant negotiates a contract between two principals, having in his possession the subject matter of the contract. It will thus be seen that Stein would not be either a broker or a commission agent, but would be engaged in the wholesale grocery business and would be liable for an entirely different license. If he bought the merchandise himself, it is his.

The Robbins Case and the law laid down in this case have been recognized as valid by the Supreme Court of the United States as late as the Berwind-White Case. When this case was decided, it was urged that if the Court upheld the validity of the New York Sales Tax, such a decision would be inconsistent with the long line of decisions following Robbins v. Shelby County Taxing District which have held invalid license taxes to the extent that they have sought to tax the occupation of soliciting

orders for the purchase of goods to be shipped into the taxing state. The Court said with reference to the Robbins Case and those following it:

> "In some instances the tax appeared to be aimed at suppressing or placing at a disadvantage this type of business when brought into competition with competing intrastate sales.... In all, the statute in its practical operation was capable of use, through increase in the tax, and in fact operated to some extent to place the merchant thus doing business interstate at a disadvantage in competition with untaxed sales at retail stores within the State.
>
> "While a state, in some instances, may, by taxation, suppress or curtail one type of intrastate business to the disadvantage of another type of competing business which is left untaxed . . . it does not follow that interstate commerce may be similarly affected by the practical operation of a state taxing statute. . . . It is enough for present purposes that the rule of Robbins v. Shelby County Taxing District has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

It will thus be seen that the Robbins Case is still recognized as valid and the law laid down therein still applies to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate.

Stein is engaged in the business of soliciting orders for the purchase of goods to be shipped from his

non-resident principals to wholesale grocers within the State of Alabama, and the license placed on Stein is a fixed-sum license and thus all of the conditions necessary to render such a statute void as set out in the Berwind-White Case have been met as far as Stein is concerned, and we respectfully insist that in the light of this case, and the other cases which have been discussed, it is evident that:

1. Stein is engaged in interstate commerce; and

2. The license levied on him places a direct burden on interstate commerce, and thus it is void.

Respectfully submitted,

MARION R. VICKERS.

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Supreme Court of the United States

OCTOBER TERM 1940

NO. 830

THOS. F. STEIN, JR.,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I

OPINIONS BELOW

The opinions of the Court of Appeals of Alabama and of the Supreme Court of Alabama in this case have not been reported in the official reports for the respective courts. The opinion of the Court of Appeals of Alabama may be found, however, reported in 199 Southern Reporter at page 11. The opinion of the Supreme Court of Alabama may be found in 199 Southern Reporter at page 13.

II

JURISDICTION

The jurisdiction of this Court is sought by this petition for writ of certiorari on the ground that the Supreme Court of Alabama has decided federal questions of substance not in accord with the applicable decisions of this Court. See Rule 38, 5(a) of this Court. We believe, however, that the federal questions of substance involved in this case have been decided in accord with the applicable decisions of this Court, and for that reason we submit this brief in opposition to the application for the writ of certiorari.

III

STATEMENT OF THE CASE

The statement of the case made in the Brief filed on behalf of petitioner in this case (pp. 6-8) is substantially correct and for that reason a further statement of the case is not made here.

It is conceded by the State that the judgment rendered by the Supreme Court of Alabama remanding this cause is a final judgment since the case was tried on an agreed statement of facts. See pages 11-13 of Brief on behalf of petitioner.

IV

SUMMARY OF ARGUMENT

The Legislature of the State of Alabama has imposed a privilege license on merchandise brokers

by the following provisions, found in General Acts of Alabama of 1935, pp. 256, 441, 442, 450.

> "Section 348. Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license, and a County license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act. * *
>
> "Schedule 29. For each commission merchant or merchandise broker in cities of fifty thousand inhabitants or over, fifty dollars ($50.00); in cities and towns of twenty-five thousand and less than fifty thousand inhabitants, thirty-five dollars ($35.00); in cities and towns of ten thousand and less than twenty-five thousand inhabitants, twenty-five dollars ($25.00); in cities and towns of five thousand and less than ten thousand inhabitants, fifteen dollars ($15.00); in cities and towns under five thousand inhabitants, whether incorporated or not, ten dollars ($10.00)."

The question presented to the courts of Alabama was whether petitioner was liable for this

privilege license in view of the fact that petitioner represented non-resident principals exclusively.

From the decision rendered by the Court of Appeals of Alabama in this case, it appears that this case was submitted in that court along with the case of *State v. W. M. Meador & Co. Inc.* This latter case has not been officially reported, but may be found reported in 198 Southern Reporter at page 163. It appears from the opinion of the Court of Appeals of Alabama in the case at bar (R. 12) that the facts are substantially the same in both cases, except that in the case of *State v. Stein*, the party defendant in the lower court represented non-resident principals exclusively. In the case of *State v. W. M. Meador & Co., Inc.*, the Court of Appeals of Alabama held that W. M. Meador & Co., was a "merchandise broker" within the meaning of the above quoted schedule of privilege licenses levied by the State of Alabama. Though the opinion by the Court of Appeals of Alabama, in the case of *State v. Stein* indicates a finding that Stein is not a "merchandise broker", no distinction is made between the business carried on by Stein and W. M. Meador & Co. The decision of the Supreme Court of Alabama in granting the writ of certiorari in the *Stein* case indicates that the decision of the Court of Appeals is disapproved wherein it was held that Stein was not liable for the license. Hence, we take it there can be no question but that Stein is subject to the privilege license levied by the above quoted schedule. The sole question for decision in this case is whether the so called "commerce clause" of the Federal Constitution, Article I,

Section 8, clause 3, shields petitioner from the imposition of the above quoted license.

The assignments of error urged in support of the writ of certiorari to this Court are to the effect that the Supreme Court of Alabama erred in its decision in this case in failing to hold that the petitioner was engaged in "interstate commerce" and in further holding that the non-discriminatory license imposed in this case could be levied on petitioner even if he were engaged in "interstate commerce".

In opposition to the application for the writ of certiorari, the State of Alabama insists that the Supreme Court of Alabama decided the federal questions of substance, namely, whether petitioner was engaged in "interstate commerce" and whether he was subject to the license herein imposed regardless of the nature of the business engaged in by him, in accord with the applicable decisions of this Court and in support of this contention maintains the following propositions of law:

1. The business of a merchandise broker regardless of the location of his principals is a local activity and is subject to local taxes.

Nathan v. Louisiana, 8 How. 73 (1850)
Williams v. Fears, 179 U. S. 270 (1900)
Ware & Leland v. Mobile County, 209 U. S. 405 (1908)

Hatch v. Reardon, 204 U. S. 152 (1907)
Brodnax v. Missouri, 219 U. S. 285 (1911)

Hopkins v. U. S., 171 U. S. 578 (1898)
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Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926)
Hemphill v. Orloff, 277 U. S. 537 (1928)
Dickson v. Uhlmann Grain Co., 288 U. S. 188 (1933)

See *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (1931)

Cf. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892)
Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887)
Crenshaw v. Arkansas, 227 U. S. 389 (1913)
Di Santo v. Pennsylvania, 273 U. S. 34 (1927)

Contra. *Stockard v. Morgan*, 185 U. S. 27 (1902)

2. Non-discriminatory licenses imposed in the buyer's state on those engaged in "interstate commerce" are not inconsistent with the congressional authority to regulate commerce among the several states.

Woodruff v. Parham, 8 Wall. 123 (1869)
Ficklen v. Shelby County Taxing District, 145 U. S. 1, (1892)

Graybar Electric Co. v. Curry, 238 Ala. 116 (1939) Aff'd 308 U. S. 513. Reh. Den. 308 U. S. 638

McGoldrick v. Berwind-White Coal Min. Co. 309 U. S. 33 (1940)

See: *Hinson v. Lott*, 8 Wall. 148 (1869)

Western Live Stock v. Bureau, 303 U. S. 250 (1938)

V

ARGUMENT

Proposition of Law 1

THE BUSINESS OF A MERCHANDISE BROKER REGARDLESS OF THE LOCATION OF HIS PRINCIPALS IS A LOCAL ACTIVITY AND IS SUBJECT TO LOCAL TAXES.

As appears from the agreed statement of facts (R. 5-7), Thomas F. Stein, Jr., the petitioner, is engaged in business for himself in the City of Mobile, Alabama, a city of over 50,000 population. He advertises himself as a merchandise broker. The exact manner in which he does business is to solicit orders in the City of Mobile, for the purchase of merchandise. When petitioner procures an order for merchandise, he then transmits the order to the seller located without the territorial limits of the State of Alabama. This terminates the business activities of petitioner. Whether the order is accepted and the goods are thereafter shipped di-

rectly to the purchaser in Mobile, or whether the order is rejected, are matters over which petitioner has no control. Petitioner does not ship any goods from one state to another, nor does he order such goods, except for the account of a third party, namely, the buyer. Petitioner is merely a mode of communication between the buyer in Mobile and the seller without the state. The business activities of petitioner cease, however, as soon as the order is transmitted. Thus, the occupation on which the privilege license is imposed has its inception and termination within the State of Alabama.

This Court has held that such activities are so local in their nature as not to constitute "interstate commerce" and hence are subject to local taxation. In the case of *Nathan v. Louisiana*, 8 How. 73 (1850) it appears that the State of Louisiana sought to impose a privilege license upon "each and every money or exchange broker". On page 80 of the opinion rendered by Mr. Justice McLean for the Court, it is stated:

> "Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce."

In reply to this argument it was stated on page 81:

> "The dealer in bills of exchange requires capital and credit. * * * He is not engaged in commerce, but in supplying an instrument of

commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on."

Cf. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892).

This Court has followed this construction of the nature of the business done by brokers in many cases. Thus local privilege licenses have been sustained when applied to emigrant labor agents,

Williams v. Fears, 179 U. S. 270 (1900)

and cotton futures brokers

Ware & Leland v. Mobile County, 209 U. S. 405 (1908).

So local taxes on sales or transfers made by stock brokers have been sustained.

Hatch v. Reardon, 204 U. S. 152 (1907)

Brodnax v. Missouri, 219 U. S. 285 (1911)

See: *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (1931)

This same principle has also been applied where federal regulations have been sought to be imposed upon those occupying the position of brokers and this Court has held that since the broker's business is local in character, Congress did not have authority to regulate such business under the "commerce clause".

Hopkins v. U. S. 171 U. S. 578 (1898).

Hill v. Wallace, 259 U. S. 44 (1922).

The converse has been recognized where states have sought to regulate those in the position of brokers.

Engel v. O'Malley, 219 U. S. 128 (1911)

Hall v. Geiger-Jones Co. 242 U. S. 539 (1917)

This Court has further held that civil actions under the federal anti-trust laws did not lie with reference to those in similar businesses on the ground that Congress did not have the authority to legislation concerning them under the "commerce clause".

Blumenstock Bros. Adv. Co. v. Curtis Pub. Co. 252 U. S. 436 (1920)
Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926)

The validity of the contract between the broker and the local buyer is determined by the law of the state where such contract is executed.

Hemphill v. Orloff, 277 U. S. 537 (1928)
Dickson v. Uhlmann Grain Co. 288 U. S. 188 (1933)[1]

The contrary is maintained by petitioner, chiefly relying on language found in certain distinguishable cases. As stated by Mr. Justice Stone writing for the Court in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 50 (1940), these general statements "are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned."

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[1] Compare the cases holding that the formation of insurance contracts even between residents and non-residents do not constitute "interstate commerce".

Paul v. Virginia, 8 Wall. 168 (1869)
Hooper v. California, 155 U. S. 648 (1895)
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913)

The case of *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) involves a discriminatory license[2] imposed on a non-resident seeking to distribute the wares of his employer in Tennessee. This is a far cry from imposing a license on a resident of the state for local activities, hence any language in that case cannot be considered as authoritative in a case such as the one at bar.

The case of *Crenshaw v. Arkansas*, 227 U. S. 389 (1913) involves a non-resident distributing his goods by salesman (employee). Certainly language in the opinion of the Court in this case could not be considered precedent in determining the nature of an independent contractor's business.

The case of *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) involves a ticket broker, but the tickets were for foreign transportation exclusively and the regulation in question was a police regulation rather than a tax. Furthermore, there was a very powerful dissent by Mr. Justice Stone, Mr. Justice Holmes and Mr. Justice Brandeis.

We admit that this Court has decided adversely to the contention here made by the State of Alabama in the case of *Stockard v. Morgan*, 185 U. S. 27 (1902.) We believe, however, that that case was inadequately considered and is unsound and in view of the cases cited above, we believe the Supreme Court of Alabama correctly refused to follow it.

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[2] See *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, 55, 56. Whether any life is left in the *Robbins* case is a much mooted question in the Supreme Court of Alabama after the remarks of Mr. Justice Stone concerning this case on pages 56, 57 of 309 U. S.

Proposition of Law 2

NON-DISCRIMINATORY LICENSES IMPOSED IN THE BUYER'S STATE ON THOSE ENGAGED IN "INTERSTATE COMMERCE" ARE NOT INCONSISTENT WITH THE CONGRESSIONAL AUTHORITY TO REGULATE COMMECE AMONG THE SEVERAL STATES.

The privilege license imposed by schedule 29 of section 348 of the Revenue Act of Alabama of 1935, *supra*, applies regardless of whether "interstate commerce" is or is not engaged in. In other words, the license is not imposed because of, or in consequence of brokers in Alabama engaging in "interstate commerce".[3] It is further to be observed that the privilege license sought to be imposed in the case at bar is imposed in the state wherein the buyer of the goods resides. A non-discriminatory license imposed on the privilege of doing business in the state wherein the seller resides might be subject to criticism because of the fact that the goods sold might be subject to multiple burdens in case the state through which the goods were transported, or the state to which they came to rest imposed additional licenses.[4] This possibility of multiple burdens is completely eliminated when the tax is sought to be imposed in the buyer's state.

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[3] *Cf. Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887). *Best & Co. v. Maxwell*,—U. S.—, 85 L. ed. (Adv. Sheets 1941) 274.

[4] See *Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938). *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

In the second place, the relationship of master and servant, or employer and employee, does not exist in this case between the non-resident seller and the petitioner. Though petitioner is an agent for both the resident buyer and the non-resident seller, he is not that type agent whose acts would generally bind his respective principals. Thus, the non-resident seller would not be responsible for any torts committed or contracts executed by petitioner (R. 6). Neither would the resident buyer be responsible for any actions of petitioner except within a very narrow and limited scope. In law and in fact, petitioner is an independent contractor in Mobile County, Alabama, engaged in the brokerage business.[5]

Any licenses imposed upon petitioner for the privilege of engaging in the brokerage business in Mobile County, Alabama, does not strike the non-resident seller. Even if petitioner were put out of business, it would not mean that the non-resident seller would be unable to distribute his wares into this state. The non-resident seller could introduce and distribute his goods into this state in person, by agent or employee, or otherwise. A prohibition directed at non-resident sellers or their employees or servants might injuriously affect the free flow of commodities between states. It does not follow, however, that such a prohibition directed against brokers within the state would have the same result. *A fortiori* a non-discriminatory privilege license im-

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[5] See I Restatement of Agency Sec. 1d, 2b.

posed on brokers within the state will not impede the free flow of commerce among the several states.

The pertinent provision in the Federal Constitution claimed to exempt petitioner from the license in this case is that "The Congress shall have the Power * * * to regulate Commerce with foreign Nations, and among the several states, * *". Unless the license sought to be imposed in this case is inconsistent with the congressional power to regulate commerce[6] then there can be no objection to the license.

Assuming that the imposition of privilege licenses for state purposes does regulate commerce[7] the question then is whether those engaged in "interstate commerce" are thereby immune from all state privilege licenses.

As noted above, the license imposed in this case is non-discriminatory. This Court has held that one in the position of a commission merchant (receiving the possession of goods sold for non-resident principal)[8] was subject to a non-discriminatory license. *Woodruff v. Parham*, 8 Wall. 123 (1869). See also *Hinson v. Lott*, 8 Wall. 148 (1869). A non-

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[6] See *Bacon v. Illinois*, 227 U. S. 504, 516 (1913)
Minnesota v. Blasius, 290 U. S. 1, 8 (1933)
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 45 (1940)

[7] *Cf., McGoldrick v. Berwind-White Coal Min. Co., supra*, 45, where Mr. Justice Stone says: "In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress."

[8] See *Slack v. Tucker & Co.*, 23 Wall. 321, 330 (1874)

discriminatory privilege license imposed upon a broker in the buyer's state, exactly like the case at bar, was held good in the case of *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892).

The doctrine that non-discriminatory licenses may be imposed in the buyer's state has been affirmed by this Court in the cases of *McGoldrick v. Berwind-White Coal Mining Co., supra; Graybar Elec. Co. v. Curry*, 238 Ala. 116 (1939) Aff'd 308 U. S. 513, Reh. Den. 308 U. S. 638. See also *Western Live Stock v. Bureau*, 303 U. S. 250 (1938).

Therefore, even if it be admitted that petitioner is engaged in "interstate commerce" and conceding that the imposition of privilege licenses can usurp the congressional authority to regulate commerce among the several states, nevertheless, non-discriminatory licenses imposed in the buyer's state do not infringe on this congressional power.

VI

CONCLUSION

Since a merchandise broker representing non-resident principals exclusively is engaged in a local business subject to local taxation, the Supreme Court of Alabama correctly held petitioner subject to the privilege license imposed by schedule 29 of section 348 of the Revenue Act of Alabama of 1935, quoted above. Even if it should be held that petitioner is engaged in "interstate commerce" nevertheless petitioner is not shielded from the privilege license

sought to be imposed in this case since the license is a non-discriminatory license and is imposed in the buyer's state. Therefore, the Supreme Court of Alabama has not decided a federal question of substance contrary to the applicable decisions of this Court, but on the other hand, has decided such question in line with the decisions of this Court, hence the application for the writ of certiorari in this case should be denied.

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